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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 349

MAYFLOWER FARMS, INC.,
Appellant,

v.

CHARLES H. BALDWIN, COMMISSIONER OF THE DEPARTMENT OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION.

MAX COHEN,
Counsel for Appellant.

SEYMOUR ELLENBOGEN,
BERNARD ELLENBOGEN,
Of Counsel.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provision sustaining jurisdiction	2
The statute of the State, the validity of which is involved	3
Date of judgment and order sought to be reviewed and date of application for appeal	4
Nature of case and basis of jurisdiction	4
Cases believed to sustain the jurisdiction	6

Table of Cases Cited.

Borden's Farm Products Company, Inc., v. Baldwin et al., 293 U. S. 194	6, 7, 8
Cumberland Coal Co. v. Board of Revision of Tax Assessments in Greene Co., Pa., 284 U. S. 23	6
Great Northern Railway Co. v. Minnesota, 278 U. S. 503	6
King Manufacturing Co. v. Augusta, 277 U. S. 100 (1928)	6
Mayflower Farms, Inc., v. Baldwin, etc., et al., 267 N. Y. 9	6
Nashville, C. & St. L. Ry. Co. v. White, 278 U. S. 456	6
Nebbia v. New York, 291 U. S. 502	6, 7

Statutes Cited.

Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 936, effective May 13, 1925, amending and re-enacting Section 237(a) of the Judicial Code (U. S. Code Annotated, Title 28, Section 344)	2, 8
Act of January 31, 1928, Chapter 14, Section 1, 45 Stat. 54, U. S. C. A., Title 28, Section 861a	2
Act of April 26, 1928, Chapter 440, 45 Stat. 466, amending Section 2 of the Act of January 31, 1928, Public, numbered 10, Seventieth Congress	2
Agriculture and Markets Law of the State of New York, Article 21-A, Section 258-q (Laws of New York, 1934, Official Volume, p. 580)	3
Constitution of the United States, 14th Amendment	6
New York State Milk Control Law (Articles 21 and 21-A of the Agriculture and Markets Law of the State of New York, as added by Chapter 126 of the Laws of 1934) (Laws of New York, 1934, Official Volume, p. 564)	3

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No. 349

MAYFLOWER FARMS, INC.,

Appellant,

v.

CHARLES H. BALDWIN, COMMISSIONER OF THE DEPARTMENT OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, AND KENNETH F. FEE, DIRECTOR OF THE DIVISION OF MILK CONTROL AND DEPARTMENT OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION ON APPEAL.

MAY IT PLEASE THIS HONORABLE COURT:

The appellant, in compliance with paragraph 1 of Rule 12 of the Rules of this Court, in support of the jurisdiction of this Honorable Court to review the above entitled cause on appeal, respectfully shows:

A. **Statutory Provision Sustaining Jurisdiction.**

The Act of Congress of February 13, 1925, Chapter 229, section 1, 43 Stat. 936, effective May 13, 1925, amending and reenacting Section 237 (a) of the Judicial Code (U. S. Code Annotated, Title 28, Section 344) provides:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State Court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ".

The Act of Congress of January 31, 1928, Chapter 14, section 1, 45 Stat. 54, U. S. C. A. Title 28, Sec. 861a, provides:

> "That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

The Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, amending section 2 of the Act of Congress of January 31, 1928, Public, numbered 10, Seventieth Congress, hereinbefore cited, provides:

> "Sec. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and

of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B. The Statute of the State, the Validity of Which is Involved.

The statute of the State, containing the four words which are challenged as unconstitutional in this case, is familiarly known as the New York State Milk Control law. It is embodied in articles 21 and 21-A of the Agriculture and Markets Law of the State of New York, as added by Chapter 126 of the Laws of 1934 (Laws of New York, 1934, Official Volume, p. 564).

The only part of the statute involved herein which is challenged as unconstitutional is the time limitation created by the words "since April tenth, nineteen hundred thirty-three" which are found in the following quoted last sentence of section 258-q of article 21-A of the Agriculture and Markets Law of the State of New York (Laws of New York, 1934, Official Volume, p. 580):

> "It shall not be unlawful for any milk dealer who *since April tenth, nineteen hundred thirty-three* has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city".

C. Date of Judgment and Order Sought to be Reviewed and Date of Application for Appeal.

The order and judgment of the Supreme Court, Albany County, of the State of New York, sought to be reviewed herein, were entered upon the remittitur and the decision of the Court of Appeals of the State of New York handed down April 16, 1935. A motion for reargument was made by the Appellant herein on April 29, 1935, and was returnable before the Court of Appeals on May 6, 1935. The motion was denied without opinion on May 28, 1935. On July 9, 1935, a petition for allowance of appeal to the Supreme Court of the United States was filed with the Chief Judge of the Court of Appeals.

D. Nature of Case and Basis of Jurisdiction.

The appellant, Mayflower Farms, Inc., is a New York State corporation organized in May, 1933. On or about April 28, 1934, it made an application to the Department of Agriculture and Markets of the State of New York for a milk dealer's license. After a hearing held upon said application, an order was made by the appellees on July 9, 1934, denying appellant's application for the sole reason that appellant had allegedly sold its milk at what is known as the "unadvertised" price (which is one cent per quart lower than the price fixed for the sale of milk having a well advertised trade name) and that although the appellant was concededly an unadvertised milk dealer selling an unadvertised brand of milk it was, nevertheless, not entitled to exercise the one cent per quart underselling privilege conferred by the statute (quoted under B hereof) upon sellers of unadvertised milk simply because it entered the milk business one month after April 10, 1933, the date specified in the statute.

Were it not for the words "since April tenth, nineteen hundred thirty-three" the appellant would assume its rightful place in the class of dealers selling unadvertised milk and would be entitled to exercise the one cent per quart underselling privilege.

The appellant obtained, by order of certiorari, a review of the order of the appellees denying appellant's application and a stay of the enforcement of appellees' order on the ground that the time limitation which prevented the appellant from enjoying and exercising the underselling privilege was arbitrary and discriminatory upon its face and denied to the appellant due process and equal protection of the laws in violation of the fourteenth amendment to the Constitution of the United States.

The Appellate Division of the Supreme Court, by a divided court, confirmed the order of the appellees and held the time limitation to be valid. No opinion was written, but Presiding Justice Hill wrote a short but sharp dissenting memorandum as follows:

"HILL, P. J.:

"I dissent. This petitioner began business as a milk dealer in the City of New York on May 28, 1933. The statute in effect requires that a dealer beginning business after April 10, 1933 shall sell its milk for one cent a quart more than a dealer who was in business before April 10, 1933 received for the same grade of milk. This as effectively prevents a person from beginning business as though the statute in terms contained a direct prohibition. The reasonableness of the regulations prescribed by the Legislature in the milk emergency is subject to court review. A court may consider "the legitimacy of the conclusions drawn from the facts found". (*People* v. *Nebbia*, 262 N. Y. 259, 268.) The facts before the Legislature did not justify giving a monopoly to dealers in business on April 10, 1933. Petitioner's constitutional right to engage in a lawful business has been abridged."

The Court of Appeals, by a divided court, likewise found the time limitation to be valid and accordingly affirmed the order of the Appellate Division. The prevailing and dissenting opinions of the Court of Appeals are reported at 267 N. Y. 9. A motion for reargument of the case in the Court of Appeals was denied without opinion. The Court of Appeals of the State of New York is the highest court of the State in which a decision in the suit could be had.

E. Cases Believed to Sustain Jurisdiction.

Many cases could be cited by appellant to sustain the jurisdiction of this Court to review the final decision of the Court of Appeals in this cause. Inasmuch as the appellant immediately invoked the guarantees given it by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, the Federal question involved is obvious. The question was duly presented; its decision was essential to the determination of the controversy, and it was actually decided by the courts of the State of New York, although adversely to the appellant's contention.

The following cases in this Court are only a few of the many that could be cited as sustaining the jurisdiction of this Court in this cause:

King Manufacturing Co. v. *Augusta,* 277 U. S. 100 (1928);

Nashville C. & St. L. Ry. Co. v. *White,* 278 U. S. 456;

Great Northern Railway Co. v. *Minnesota,* 278 U. S. 503;

Cumberland Coal Co. v. *Board of Revision of Tax Assessments in Greene Co., Pa.,* 284 U. S. 23;

Nebbia v. *New York,* 291 U. S. 502;

Borden's Farm Products Company, Inc., v. *Baldwin et al.,* 293 U. S. 194.

In *Nebbia* v. *New York, supra,* the right of the State of New York to fix the prices at which milk could be sold in the State of New York was involved in an attack made by Nebbia upon the unconstitutionality of the first milk control law of the State of New York. This law was substantially the same as the milk control law under which the case at bar arises. Jurisdiction of this Court to review the decision of the Court of Appeals therein was virtually conceded.

In *Borden's Farm Products Company, Inc.,* v. *Baldwin et al., supra,* the same statutory provision involved in the case at bar was the subject of attack. In the *Borden* case, however, the entire "unadvertised" differential provision was challenged by the Borden Company as unconstitutional in that it forced the Borden Company and three other large milk dealers, classified by the division of milk control of the State of New York as the well advertised dealers to sell their milk at one cent per quart more than the price fixed for the same grade of milk sold by dealers not having a well advertised trade name.

The position of the appellant in the case at bar is different from that taken by the Borden Company. In this case the appellant concedes the constitutionality of the differential provision in so far as it differentiates between dealers selling milk having a well advertised trade name and those selling milk not having a well advertised trade name. Appellant is entitled to complain only and it complains only of so much of the differential provision as prevents it from exercising the underselling privilege enjoyed by all other sellers of unadvertised milk, viz: The words "since April tenth, nineteen hundred thirty-three." This Court took jurisdiction in the *Borden* case, although it did not decide on the merits the constitutional question therein involved, reserving the determination thereof until a future time when, pursuant to its direction, evidence could be taken concerning trade conditions existing in the milk

business in the City of New York at or prior to the time of the enactment of the first milk control law. Whatever the decision of this Court ultimately will be in the *Borden* case, the appellant respectfully submits that this Court should first review the narrower Federal, constitutional question involved in the case at bar.

By reason of the foregoing, it is respectfully submitted that this honorable Court has jurisdiction of this appeal by virtue of Section 237 (a) of the Judicial Code.

Respectfully submitted,

MAX COHEN,
Counsel for Appellant.

SEYMOUR ELLENBOGEN,
BERNARD ELLENBOGEN,
Of Counsel.